Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare, Pennsylvania, Petitioner

v.

TOWN COURT NURSING CENTER, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS EMMA COOPER, et al.

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I. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The following constitutional provisions, statutes, and regulations are involved, the relevant portions of which are reproduced in the appendix to the brief:

United States Constitution, Amendment V
United States Constitution, Amendment XIV
42 U. S. C. § 1396a(19) (1970)
45 C. F. R. § 205.10(a)(5) (1977)
Pa. Stat. Ann. tit. 62, § 401 (1968)
Pa. Stat. Ann. tit. 62, § 402 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 441.1 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 442.1 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 443.1 (1979-1980 Pocket Part)
28 Pa. Code § 201.29
28 Pa. Code § 201.30
28 Pa. Code § 201.34
28 Pa. Code § 201.35

Other relevant statutory and regulatory provisions are set forth in the appendix of the briefs of Petitioner and the Secretary of Health, Education, and Welfare. In addition, other regulatory material pertinent to the questions presented is set forth in the appendix to this brief.

II. QUESTIONS PRESENTED.

1. May Petitioner seek review of a judgment of a court of appeals when she failed to appeal or cross-appeal from the judgment of the district court and when she expressly took no position on the merits before the court of appeals?

2. May the United States Department of Health, Education, and Welfare ("HEW") seek review of a judgment of a court of appeals when Respondents have never sought relief against HEW and HEW failed to file or join in a petition for certiorari?

3. Do skilled nursing facility patients receiving benefits under the Pennsylvania Medical Assistance Program have a constitutional or statutory right to be heard with respect to and prior to termination of the facility from participation in the program and transfer of the patients from that facility?

III. COUNTER-STATEMENT OF THE CASE.

A. The Patients.

Respondents Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei, and Nancy Truitt (referred to hereinafter collectively as "the Patients") are patients at Town Court Nursing Center, Inc. ("Town Court"), a skilled nursing facility [1] in Philadelphia, Pennsylvania. Each is sufficiently indigent to qualify for benefits under the Pennsylvania Medical Assistance Program.[2] Each is also in need of round-the-clock nursing care requiring placement in a skilled nursing facility.

Emma Cooper has been a patient at Town Court since July 16, 1976; Mary Crawford, since September 23, 1975;

1. Nursing homes are classified by the type and degree of care provided to their patients. The classifications are skilled nursing facility, intermediate care facility, and domiciliary care facility. Of the three, the most intensive medical care is provided by skilled care facilities. As recently described, "[s]killed care patients generally fall into two categories: the short-term convalescent recovering from serious accident, operation or illness, or the long-term chronically ill. Examples of skilled care services include administration of medication with known dangerous side effects; restrictive procedures such as bowel training and physical therapy; "tube" maintenance; tracheostomy maintenance; and the administration of oxygen." *Brown v. Commonwealth of Pennsylvania, Department of Public Welfare*, — Pa. Commw. Ct. —, 401 A. 2d 616, 617 (1979), citing DPW-OMP-MA Manual 9424.3 and 9424.32. The DPW-OMP-MA Manual is an unpublished compilation of regulations of the Pennsylvania Medical Assistance (MA) Program issued by the Office of Medical Programs (OMP) of the Pennsylvania Department of Public Welfare (DPW). See also DPW-OMP-MA Manual 9424.6; 42 U. S. C. § 1395x(j) (1970); 42 C. F. R. § 405.1101 *et seq.* (1977).

2. The Pennsylvania Medical Assistance Program, Pa. Stat. Ann. tit. 62, § 441.1 *et seq.*, is often referred to as "Medicaid," the popular name of Title XIX of the Social Security Act, 42 U. S. C. § 1396 (1970) *et seq.*, by which the federal government reimburses states for part of the expense of their medical assistance programs. Although the Pennsylvania program and Medicaid parallel each other to a large extent, Pennsylvania has distinct regulations.

Hazel Kemp, since October 18, 1973; Arnold L. Phillips, since October 18, 1973; Delphine Taddei, since October 16, 1976; and Nancy Truitt, since February 28, 1977. (A. 10a-11a) Together, they have lived almost twenty-five years at Town Court and they continue to receive care at Town Court to this day. The average age of patients at Town Court is the mid-seventies. (A. 199a)

B. Town Court.

The Patients have no direct interest in the history of the relationship between the governmental agencies and Town Court. A review of that relationship, however, is necessary to rebut the apparent contention of Petitioner, Helen B. O'Bannon, Secretary of Public Welfare of Pennsylvania ("Petitioner"), and the Secretary of Health, Education, and Welfare ("HEW") that the recognition *vel non* of Patients' constitutional or statutory rights depends somehow upon Town Court's alleged past misdeeds.

Town Court was a certified Medicaid provider from the beginning of the Pennsylvania Medical Assistance Program in 1967. It was decertified in 1974, although it continued to be licensed under state law. Town Court appealed that decertification, but no administrative hearing has ever been held on the appeal.[3]

In 1975, Town Court applied for recertification which was granted in May 1976 for both the Medicare and Medicaid programs.[4] Two months later, after being notified

3. *In re Town Court Nursing Center, Inc.*, Office of Appeals, HEW, Social Security Administration, Docket No. PS-94. Town Court has challenged the failure to provide an administrative hearing as a violation of its due process rights. That action is pending in the United States District Court for the Eastern District of Pennsylvania on cross-motions for summary judgment under caption *Town Court Nursing Center, Inc. v. Califano*, Civil Action No. 77-4065.

4. Medicare, 42 U. S. C. § 1395 (1970) *et seq.*, is a federally-administered health insurance program which provides, *inter alia*,

by the local district attorney of a complaint he had received (A. 33a), HEW conducted its own survey of Town Court which produced radically different conclusions from those of the Pennsylvania Department of Health in April 1976, which had resulted in the recommendation for certification accepted by HEW. The findings differed greatly; *e.g.*, the federal surveyors found deficiencies purportedly present at the time of the state survey but which were not found by the state surveyors. (A. 65a, 67a, 70a, 84a, 90a, 91a) Nevertheless, Town Court's certification was continued without qualification.

When state surveyors next inspected Town Court in November 1976 and March 1977, they allegedly found substantial deficiencies. However, none of these alleged deficiencies involved violations of the *Life Safety Code*.[5] Reports of these surveys were the basis for the May 20, 1977, Pennsylvania Medical Assistance Program decertification which generated the case under review by the Court.[6] Town Court again appealed from the decertification, but no hearing examiner has been assigned to hear

4. (Cont'd.)
skilled nursing services to its insureds. Pursuant to state and federal regulation, a skilled nursing facility may be certified under either Medicare (in which case the provider certification process is solely an HEW decision), or Medicaid (in which case the provider certification process is a state decision subject to federal review), or both (in which case the certification process is based upon state recommendation but subject to federal approval or revocation). Town Court has been jointly certified under both Medicare and Medicaid.

5. This Code was promulgated by the National Fire Protection Association, setting forth structural requirements for nursing home safety.

6. On May 17, 1977, HEW terminated Town Court from the Medicare program. (A. 294a) Petitioner's termination of Town Court from the Pennsylvania Medical Assistance Program (A. 291a) then followed pursuant to state and federal regulations.

the merits of the controversy, nor has a hearing been scheduled.[7]

This second decertification decision was ten days after the issuance of a presentment by a special state investigating grand jury. (A. 551a)[8] Town Court was indicted and in September 1977 a plea bargain was entered into and approved by the court which resulted in: (1) a nolo contendere plea being entered on seven summary offenses of violation of state regulations in 1975 and 1976, as to which a fine was imposed; and (2) consent to the retention, for a period of two years, of a consultant selected by the Pennsylvania Department of Health. Charges of reckless endangerment of life, referred to in the HEW Brief at 9 n. 22, were dismissed by the court.

Since that time, other state inspections of Town Court have been made, resulting in the following action:

1. *June 1977*—Inspection by Pennsylvania Department of Health for relicensure—provisional license to operate skilled nursing facility issued; (A. 534a-45a)[9]

2. *November 1977*—Inspection by Pennsylvania Department of Health for relicensure and Medicare and Medicaid participation—provisional license to operate skilled nursing facility issued and, in March 1978, Petitioner recommended to HEW that Town Court be recertified as a provider under Medicaid; [10]

3. *April 1978*—Inspection by Pennsylvania Department of Health for relicensure—full one-year license to operate skilled nursing facility issued;

4. *April 1979*—Inspection by Pennsylvania Department of Health for relicensure and Title VI status [11]—full one-year license to operate skilled nursing facility issued.

Although the Patients are fully aware of the allegations against Town Court, they have filed this action

7. There were two appeals taken. The first was taken from the Medicare decertification and is to be heard by the Office of Hearings and Appeals of the Social Security Administration. The Medicare decertification appeals process is described in Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 Nw. U. L. Rev. 139, 146-47, 166-67 (1975). See also appendix to brief, A1-A3. The second was taken from the Pennsylvania Medical Assistance Program decertification. The latter appeal was heard and continued indefinitely by a Pennsylvania administrative law judge pending federal action. The review in the Pennsylvania Medical Assistance Program appeal is limited to the question of the existence of Medicare decertification; the merits of the HEW decertification decision are not considered. (A. 292a)

8. An objection to the introduction of this presentment was raised in the district court. The court admitted the presentment "for what it is worth." (A. 521a) The issue was again raised before the court of appeals which doubted "the relevance of the presentment to the issues raised . . . ," but nevertheless did ". . . not believe any prejudice resulted from the reception of the presentment into evidence." 586 F. 2d at 271 n. 4.

9. A recent decision by a Social Security Administration administrative law judge holds that HEW may decertify a nursing home based only upon conditions existing on the date of decertification, not those found at a survey months prior to that date. *In re North Penn Convalescent Residence, Inc.*, Office of Appeals, HEW, Social Security Administration, Docket No. PS-157, Feb. 16, 1979. Thus, in view of the results of the June 1977 survey, there is a significant basis for dispute with respect to decertification (effective June 18, 1977) within Petitioner's own survey reports. See also medical review follow-up survey performed by Pennsylvania Department of Public Welfare on May 9, 10 and 11, 1977. (A. 380a-86a, and especially A. 384a-85a)

10. HEW has not acted upon this recommendation. Petitioner acknowledges Town Court's continuing licensure under state law. Petitioner's Brief at 8 n. 10.

11. Title VI, 42 U. S. C. § 801 (1970) *et seq.*, refers to a federally-reimbursed state program for rehabilitation and related services to the aged, blind, and disabled.

because they are satisfied with the care they are receiving at Town Court and wish to remain there.

C. Procedural History.

On July 20, 1977, the Patients [12] instituted an action against Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania (Secretary Beal and his successors are referred to as "Petitioner").[13] The action was filed as a class action on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court.

In their complaint, the Patients alleged that they were medically indigent under Pennsylvania law; that they were in chronic need of the services provided by Town Court; that such services were not available elsewhere at other skilled care facilities in Philadelphia; that if Town Court is compelled to close or otherwise cease providing skilled care services to them, they will suffer immediate and irreparable psychological and physical harm; and that the action of Petitioner in terminating Town Court violated their right to a hearing under 45 C. F. R. § 205.10 and the

12. Throughout these proceedings both in the district court and in the court of appeals, the Patients were represented by separate counsel although counsel for Town Court took the laboring oar at hearings and argument. Inasmuch as the Patients continue as parties here and Town Court does not, these parties' activities below, even though joint, are ascribed to the Patients.

13. This action is set forth in count II of the complaint (A. 7a) filed by both Town Court and the Patients. The remaining counts of the complaint set forth causes of action brought by Town Court only, both against Petitioner and against HEW. These other counts have no direct bearing upon the disposition of this matter. *Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266 (3d Cir. 1978).

Fifth and Fourteenth Amendments to the Constitution of the United States. (A. 7a-13a) [14]

The Patients sought to enjoin Petitioner, prior to a final determination of all appeals by Town Court from the termination of its Medicare and Medicaid certifications, from (1) terminating those certifications; (2) removing from Town Court those patients eligible for benefits under those programs; (3) discontinuing or withholding payments to Town Court for their care; and (4) prohibiting placement of other Medicare and Medicaid patients at Town Court.

The Patients obtained a temporary restraining order from the district court. The order prohibited termination or withholding of payments to Town Court for care of Medicaid beneficiaries.[15]

14. The Patients never received notice from Petitioner of the termination of Town Court and have been provided no opportunity to participate in the termination process. Although Petitioner and HEW contend that the HEW manual establishing survey procedures would appear to require patient interviews by state surveyors (Petitioner's Brief at 22 n. 20; HEW Brief at 6 n. 17), that contention was not raised in the district court. Further, no such interviews occurred in the surveys of November 1976 and March 1977, as the survey reports in the record illustrate. (See A. 63a, 109a, 400a, 424a) In all the reports in the record, only two patients were interviewed in the course of a federal survey conducted from July 19 through 23, 1976 (A. 73a, 87a), and other patients, perhaps as many as ten, were interviewed during the course of a state survey of March 19 and 20, 1974. (A. 40a, 41a, 50a, 51a, 57a) These interviews consisted of bedside conversations in which patients were asked about the food they received, staff handling, and alleged verbal abuse.

15. Such relief was based, *inter alia*, upon the affidavit of Maurice Linden, M.D., a Philadelphia psychiatrist. Dr. Linden stated: "Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court." (A. 16a, 17a) Dr. Linden later testified at the preliminary injunction hearing. (A. 251a-54a)

A hearing was then held on the Patients' motion for a preliminary injunction. At that hearing, the Patients presented seven witnesses, including five independent experts. These experts, whose testimony was uncontradicted,[16] included: (1) a professor of health care administration; (2) a director of a county department of health and hospital superintendent and former director of the New Jersey Medical Assistance Program; (3) a licensed nursing home administrator and registered nurse; (4) a registered pharmacist and former chief of pharmaceutical services for the New Jersey Medical Assistance Program; and (5) a board-certified psychiatrist with extensive experience in geriatric service. Each testified to inspections he made of Town Court in June and July 1976. Each testified that no danger to the health and safety of the patients existed at Town Court. (A. 221a, 227a, 248a, 253a, 259a) The experts also submitted voluminous reports of their observations of patient care at Town Court and analyses of the last state survey prior to decertification. (A. 300a, 318a, 343a, 357a, 365a, 373a)

Dr. Maurice Linden, one of the experts who testified, is a board-certified psychiatrist in practice for thirty-two years, a clinical professor of psychiatry at Thomas Jefferson University, and chief of the geriatric psychiatric outpatient service for the Jefferson Community Mental Health Center. He testified as follows (A. 252a-53a):

> Q. Now, sir, you have observed many of the patients at the Town Court Nursing Home?
>
> A. Oh, yes.
>
> Q. Would you care to give us an estimate of how many you may have observed during the course of your visits there.

16. At no time during the course of these proceedings did either Petitioner or HEW present any medical or other expert testimony of any kind.

> A. In the past three years the total number of people that I have seen there at the Home I suppose they would number in the 300, 200.
>
> Q. Now, sir, assuming that these patients had to be removed within a short period of time such as 30 days or 60 days, would there be any effect on these patients from the mental point of view—forgetting the physical aspects of it in your opinion—and, if so, will you give His Honor the reasons therefor.
>
> A. Yes. My opinion in this instance is studied. It is based on experience in the field of gerontology and geriatrics, the field I have been in since 1946.
>
> There is copious evidence in the literature that the transfer of dependent elderly patients out of an institution of health care, nursing home, for example, tends to be on a high mortality rate. Some get sicker and some die.
>
> Q. In your opinion would the removal of any of these patients endanger their lives or aggravate their mental or health conditions?
>
> A. On the basis of that finding, I think we could safely say yes.
>
> Q. In your opinion is there any danger to the health and safety of the patients that are presently residents or patients at Town Court Nursing Home?
>
> A. I have not found reason to believe that. I think there is no such danger to their health or safety at the present time.

Finally, uncontradicted testimony[17] also established that "[t]here are just thousands of people who are waiting

17. HEW presented only one witness who attempted to explain the basis for the decision to decertify Town Court. The court sustained an objection to such testimony because the witness was not involved in the decision-making process at the time the determination was made. (A. 281a)

for placement of [in] skilled care facilities in Philadelphia. There are many, many facilities in Philadelphia about to be closed because of life safety code problems." (A. 267a) [18]

Upon completion of the hearing, the district court issued a bench order (A. 288a-89a): [19]

> Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.
>
> Since it is clear on the record that the continuation of patients in that nursing home during that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—under all those circumstances the following Order is entered:
>
> That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.
>
> It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary choice or in cases of medical necessity. In short, there will be [no] attempt to simply transfer patients for the sake of putting them in some other place than this.
>
> And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

18. See *United States v. Commonwealth of Pennsylvania*, 394 F. Supp. 261, 262 (M. D. Pa. 1975), *aff'd* 533 F. 2d 107 (3d Cir. 1976).

19. The Order was preceded by the statement that "it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition." (A. 288a)

Town Court's request for reconsideration by HEW was denied (A. 140a), whereupon the Patients moved for an extension and renewal of the preliminary injunction. At the hearing on the motion for extension, one of the experts who testified at the earlier hearing submitted a further report of an inspection of Town Court in August 1977. His conclusion was the same: no patient's life or safety would be endangered to any extent by remaining at Town Court. (A. 525a)

Following that hearing, the district court issued a second bench opinion and order (A. 531a-33a):

> I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.
>
> Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this

case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future.

I am also satisfied that the evidence which has been presented this morning by the first witness [20] sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobbledygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a position which I frankly do not understand and never will, there is nothing that the Court can do about it.

20. Claudette V. Campbell, Regional Officer's Consultant for the Office of Long-Term Care, HEW, Region III. She was HEW's only witness. (A. 501a-19a)

If the administrative bureaucrats persist in being blind to facts, if they persist in looking at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

* * *

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a

bureaucratic judgment based upon what is on paper and what may have existed in the past.

Later the same day the district court issued a written order requiring only that payments to Town Court be continued for patients remaining there and staying its effect for ten days to permit the Patients to seek a further stay from the court of appeals. (A. 118a)

Patients filed a notice of appeal (A. 120a) and a motion for injunction pending appeal with the court of appeals. (A. 124a) The court of appeals granted Patients' motion, enjoining defendants both from removing patients from Town Court and from prohibiting placement of patients at Town Court. (A. 142a)

HEW filed a cross-appeal from that portion of the district court's order which required continued payment on account of Medicare and Medicaid patients remaining at Town Court, but Petitioner filed no cross-appeal. In the brief in the court of appeals, Petitioner described herself as a "stakeholder" whose "position should not be inferred to be either for or against the position of either the federal agency [HEW] or the nursing facility."

The court of appeals, *en banc*, concluded that the Patients have a constitutional right to a hearing prior to termination of a nursing home's participation in the Medicaid program. (A. 144a) The cause was remanded for further proceedings to determine "what procedures will satisfy the constitutional rights of" the Patients to such a hearing. (A. 150a) The court of appeals also affirmed that portion of the district court order from which HEW had cross-appealed (A. 150a), thereby requiring it not to withhold payments to Town Court.

Petitioner thereafter filed a petition for certiorari. HEW did not file its own petition for certiorari and did not join in or support the petition which was filed.

D. Statutory Scheme.

Patients are recipients of benefits under the Pennsylvania Medical Assistance Program. Established in 1967 and administered by the Pennsylvania Department of Public Welfare, that program is the latest form of a comprehensive scheme in Pennsylvania to provide medical care to the indigent.[21] Assistance is provided to categorically and medically needy persons, *i.e.*, those who are financially unable to afford necessary medical care.

As part of its detailed regulations for skilled and intermediate care facilities, 28 Pa. Code § 201.1 *et seq.*, Pennsylvania law provides that each facility shall establish policies in writing regarding the rights of patients [28 Pa. Code § 201.34(a); see also 28 Pa. Code § 213.2(d)]; that these policies shall be available to "staff, patients, consumer groups and interested public . . ." [*id.* at § 201.34(c)]; and that a patient shall be "afforded the opportunity to participate in the planning of his medical treatment." [*Id.* at § 201.34(g)] It further provides that "[t]he patient is encouraged and assisted throughout his period of stay to exercise his rights as a patient and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff or to outside representatives of his choice or both." [*Id.* at § 201.34(i)][22] Each facility must adopt and post in a

21. For details of the historical evolution of the present program, see Historical Note to Pa. Stat. Ann. tit. 62, § 207 (1968).

22. Pennsylvania also has adopted detailed requirements permitting recognized community organizations and representatives of community legal service programs to visit patients. *Id.* at § 201.35(c). "At no time may the facility restrict the right of the patient to have legal representation." *Id.* at § 201.35(d). The purpose of such visits may include informing patients of their rights and entitlement and "assisting patients in assert[ing] their legal rights . . ." individually or on a group basis, so as to extend to patients the full enjoyment of their rights. *Id.* at § 201.35(e).

highly conspicuous place [*id.* at § 201.34(w) and .34 (z)], *inter alia*, the following information:

> The patient shall be transferred or discharged only for medical reasons or for his welfare or that of other patients or for nonpayment of his stay. . . . *Id.* at § 201.34(h).[23]

A certification system has been established in order to qualify a nursing home to furnish care under Medicaid. The standard for certification under Medicare and Medicaid and the standards for licensing in Pennsylvania are "99.9 percent similar . . . [s]o that if a license were given one should assume and could presume that the standards for licensing were met and, therefore, the standards for Medicare and Medicaid were substantially in compliance at that particular time." (A. 526a) For this reason, the

23. Nearly identical language is found in 42 C. F. R. § 405.1121 (k)(4) (1977), for which HEW's interpretative guidelines define the terms "transfer," "medical reasons" and "welfare" as follows:

> 1. The term "transfer" applies to the movement of a patient from one location to another within a facility, as well as movement to another facility.
>
> 2. "Medical reasons" for transfer or discharge are based on the patient's needs and are determined and documented by a physician. Movement may be required to provide a different level of care.
>
> 3. "Welfare" of a patient or that of other patients refers to *their social or emotional well-being*. This is a complex concept in that assessment can vary with each individual patient, facility, and surveyor. *An example of moving a patient* for his welfare is *to facilitate visits by relatives and friends*. A patient might also be transferred or discharged because his behavior poses a continuing threat to himself (*i.e.*, suicidal) or to the well-being of other patients (*e.g.*, his behavior is incompatible with their needs and rights).

HEW, *Interpretative Guidelines and Survey Procedures for the Application of the Conditions of Participation for Skilled Nursing Facilities* at 21 (emphasis added).

Pennsylvania Department of Health often conducts licensure and certification surveys simultaneously.[24]

24. The November 1977 survey of Town Court, see p. 7 *supra*, was a combined relicensure-Medicare-Medicaid survey.

IV. SUMMARY OF ARGUMENT.

Petitioner neither appealed nor cross-appealed from that part of the district court order which required her to continue payments to Town Court for Medicaid patients and took no position either for or against the Patients or HEW in the court of appeals, where she described herself as a "stakeholder," indifferent to the outcome. Thus, not only does Petitioner have no standing to seek review by the Court, she has also failed to preserve any issues for such review. *Brennan v. Arnheim & Neely, Inc.*, 410 U. S. 512, 516, 521 (1973).

The Patients have not sought relief against HEW; it was not a party to their one-count claim against Petitioner In addition, HEW neither filed a petition for certiorari on its own behalf nor joined in or filed a brief in support of the petition which was filed and therefore cannot attack the judgment. *Ryerson v. United States*, 312 U. S. 405, 408 (1941).

On the merits, the Patients have property rights in their continued residence and care at Town Court. These property rights arise from the provider agreement between Petitioner and Town Court—a contract of which the Patients are third party beneficiaries. *Spires v. Hanover Fire Insurance Co.*, 364 Pa. 52, 70 A. 2d 828 (1950); *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689 (N. D. Ohio 1977). In less traditional but equally realistic terms, property rights subject to constitutional protection may be found in the Patients' legitimate claims of entitlement to the benefits of social welfare legislation enacted for the benefit of a class of which they are members. *Goldberg v. Kelly*, 397 U. S. 254 (1970).

The Patients, if they are relocated to another skilled care facility, will likely suffer the effects of "transfer trauma," an increased possibility of untimely death or serious illness which results from the transfer of elderly, infirm persons from one location to another. This exposure to risk of illness or even death poses a threat to life or liberty of constitutional dimensions. *Meyer v. Nebraska*, 262 U. S. 390 (1923). In addition, this harm causes the Patients a reduction in assistance entitling them to a statutorily granted pretermination notice and hearing. 45 C. F. R. § 205.10(a)(5) (1977).

Since decertification of Town Court will deprive the Patients of property rights, will expose them to loss of life or liberty and will result in a reduction of their assistance, they are entitled to a hearing before Town Court is decertified. Allowing the Patients this process will reduce the risk of an erroneous deprivation of their rights, and will not unduly burden the administration of the Medicaid program.

V. ARGUMENT.

A. Petitioner May Not Obtain Review When She Failed to Appeal or Cross-Appeal From the Judgment of the District Court Granting Relief Against Her.

Petitioner seeks review of a judgment of the court of appeals. That judgment affirmed the judgment of the district court to the extent that it granted relief to the Patients against Petitioner. The court of appeals also vacated and remanded the case for further proceedings regarding the relief which the district court denied the Patients.

The district court granted injunctive relief against Petitioner requiring her to continue payments to Town Court on account of Medical Assistance patients so long as they remained at Town Court, even though Petitioner had determined Town Court to be an unqualified provider. Petitioner filed no appeal or cross-appeal from that judgment which surely entailed a decision, albeit a preliminary one, on the merits.[25]

The failure of Petitioner to appeal meant that she had no objection to the merits of the district court order. Moreover, her conduct in filing a brief in the court of appeals in which she characterized herself as a "stakeholder" and took no position "for or against" the legal or factual issues raised by the Patients and by HEW further confirmed her disinterest in the proceedings in the court below.[26] Had Petitioner attacked the underlying merits of

25. The order did not run against HEW inasmuch as there were no Medicare patients suing, and indeed, there were none then residing in Town Court. (A. 210a)

26. *See Montana Power Co. v. Public Utility District No. 2 of Grant County, Washington*, 587 F. 2d 1019, 1022 n. 1 (9th Cir. 1978) [when, at oral argument, counsel took no position on issue,

the district court order in the court of appeals, she would have been attempting to expand the relief she had been granted. In the absence of an appeal or cross-appeal, Petitioner was and is barred from doing so.

As the Court noted in *United States v. New York Telephone Co.*, 434 U. S. 159, 166 n. 8 (1977), "the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." HEW, however, cites briefs filed in that case to support the proposition that any argument may be raised by a party which prevailed below although such attack might give the party greater relief in future suits than it accepted in the present one. HEW Brief at 18 n. 27. However, in *Brennan v. Arnheim & Neely, Inc.*, 410 U. S. 512, 516, 521 (1973), the Court rejected, as an impermissible collateral attack, arguments made by a prevailing party which, if sustained, would have invalidated the relief granted against that party below and from which it had not filed a cross-petition. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE AND PROCEDURE § 4004, at 520-21 (1977). See also *Wise v. Lipscomb*, 98 S. Ct. 2493, 2501 (1978). A similar situation is presented here where, as the court of appeals noted: "This appeal, however, is from a preliminary proceeding in the district court. Upon remand, therefore, [Petitioner] will be free to seek a modification of the district court's order

26. (Cont'd.)
the lack of position construed as equivalent of a waiver and opposing party assumed to be correct]. Likewise, Petitioner took no position and made no statements of any kind at the district court hearing at which the order reviewed by the court of appeals was issued. *Cf. Greyhound Corp. v. Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2376 (1978) [petition to intervene filed by United States in ICC proceeding, which took no position on the merits, sought no relief and charged no party with wrongdoing, of no effect in tolling the Clayton Act statute of limitations for subsequent private action].

to conform to the judgment of this court with respect to Town Court's rights." 586 F. 2d at 279.

A related question, regarded as "close" by HEW (HEW Brief at 21), is, assuming Petitioner does have the right to seek review, whether she properly preserved the arguments now presented to the Court. Inasmuch as Petitioner did not prevail below, and raised no argument and took no position below, the only means by which she may contend to have preserved the issues for review is by the actions of HEW before the court of appeals.

However, Petitioner, and not HEW, is constitutionally and statutorily responsible for the administration of the Pennsylvania Medical Assistance Program from which the Patients receive benefits.[27] For this reason, the separate interests of Petitioner could not have been protected by HEW, as raised by the Patients in their reply brief before the court of appeals. Petitioner's obligations arise primarily under Pennsylvania constitutional and statutory law. Petitioner's singular failure to discuss Pennsylvania law either before the Court or the court of appeals exemplifies her misconception of her role in this litigation. The court of appeals commented: "[w]e believe [Petitioner] misconceives [her] position in this litigation. . . . Since [Petitioner] has not cross-appealed, the propriety of the order that the district court entered against [her] is not before us." 586 F. 2d at 279.

In face of the express indifference of Petitioner in the court of appeals, no issues have been preserved for review by the Court.

27. The sole responsibility of the state to administer its medical assistance program is well recognized. *Kane v. Parry*, 41 N. Y. 2d 1051, 396 N. Y. S. 2d 182 (1977); *Montana Deaconess Hosp. v. Department of Social and Rehabilitation Services*, 167 Mt. 383, 538 P. 2d 1021 (1975). *Cf. Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266, 279 (3d Cir. 1978).

B. HEW May Not Obtain Review of the Judgment Below.

1. Patients' Complaint Sought No Relief Against HEW.

Patients' complaint consists of a single count against Petitioner only, not HEW. (A. 10a-11a) HEW may not seek review of a decision in an action which has not sought and does not now seek relief against it.[28]

2. HEW Is Barred From Seeking Review of the Judgment Below by Reason of Its Failure to File a Petition for Certiorari.

HEW did not file its own petition for certiorari, and did not seek to join in or file a brief in support of the petition which was filed.[29] Therefore, HEW may not attack the judgment below. *Ryerson v. United States*, 312 U. S. 405, 408 (1941); *Letulle v. Scofield*, 308 U. S. 415, 421 (1940).[30]

C. Decertification of Town Court From the Pennsylvania Medical Assistance Program and the Consequent Transfer of Patients to Another Facility Without Affording Process to the Patients Amounts to a Deprivation of Their Due Process Rights to Life, Liberty, and Property.

1. Introduction.

In the past decade the Court has established criteria for evaluating the due process claims of the Patients. A

28. It is possible that there is an independent federal obligation to reimburse the state for monies expended in the Pennsylvania Medical Assistance Program. *Maxwell v. Wyman*, 478 F. 2d 1326 (2d Cir. 1973); *United States v. Commonwealth of Pennsylvania*, 394 F. Supp. 261, 263 (M. D. Pa. 1975).

29. HEW also had an opportunity to file a petition for certiorari in a companion case, *Klein v. Califano*, 586 F. 2d 250 (3d Cir. 1978), but likewise chose not to do so.

30. Further, even if HEW could now pursue review, it must fail because Petitioner failed to preserve her rights in the court of appeals.

review of that precedent leads compellingly to the conclusion—as recognized by a majority of the members of the Third Circuit Court of Appeals—that patients of a skilled care nursing facility are entitled to a hearing prior to termination of that nursing facility as a provider under the Medicaid program and ultimate transfer of the patients to another facility.

The Patients' right to pre-termination process is based upon their right not to be deprived of "life, liberty, or property, without due process of law . . ." as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Each of these protected interests—life, liberty, and property—provides a distinct basis for recognizing those due process rights.

2. Patients Will Be Deprived of Their Property Rights by Decertification of Town Court and the Transfer of Patients to Another Facility.

The Patients have a property interest in the right to remain in their skilled care nursing facility. This property right has two sources. The provider agreement covering their care vests the Patients with contractual rights as third party beneficiaries of the agreement. Further, the federal and state statutory scheme and the common law in Pennsylvania which provide for the Patients' care create benefits for them from which a legitimate claim to remain in the facility arises.

(a) Patients Are Third Party Beneficiaries of the Provider Agreement Between Town Court and the Pennsylvania Department of Public Welfare.

Town Court has on an annual basis entered into a provider agreement with Pennsylvania's Department of

Public Welfare for the care of patients in a skilled care nursing home under the Pennsylvania Medical Assistance Program.[31] The main—if not sole—objective of the agreement is to provide the Patients with adequate skilled nursing facilities, care, services, and treatment, thus making them third party beneficiaries of the contract.

Pennsylvania has long recognized the rights of third parties to assert rights under contracts made for their benefit.[32] In the leading case, *Spires v. Hanover Fire Insurance Co.*, 364 Pa. 52, 70 A. 2d 828 (1950), the Pennsylvania Supreme Court declared that the rights of a third party to a contract could be established by showing that the parties had contemplated that the third party would be benefited and had indicated that intention in the contract. The Court noted, however, that it was not necessary that a particular third party beneficiary be specifically or individually designated in the contract. 364 Pa. at 57 n.*, 70 A. 2d at 831 n.*.[33]

31. Certification under the Pennsylvania Medical Assistance Program makes possible the execution of a "provider agreement" between a health care provider and the Pennsylvania Department of Public Welfare. The agreement, titled "Commonwealth of Pennsylvania Department of Public Welfare Medical Assistance Program Skilled Nursing Home Care Agreement," is contained in the DPW-OMP-MA Manual at Appendix VIII promulgated by the Pennsylvania Department of Welfare. 3 Pa. Bulletin 1725 (1973). The form of the agreement is appended to this brief. (A24)

32. See, *e.g.*, *Book's Estate*, 297 Pa. 543, 147 A. 608 (1929), where the Pennsylvania Supreme Court recognized the rights of children, not parties to a contract, to enforce its terms providing for their maintenance and support. The provisions of the RESTATEMENT OF CONTRACTS relating to the rights of third party beneficiaries have been adopted as the law of Pennsylvania. *Commonwealth v. Great American Indemnity Co.*, 312 Pa. 183, 167 A. 793 (1933).

33. State trial courts in Pennsylvania have broadly interpreted contracts with governmental agencies as giving rights to third parties. See, *e.g.*, *Lieberman v. Howard Johnson's, Inc. (No. 1)*, 68 Pa. D. & C. 2d 129 (1973), a class action on behalf of all users of the Pennsylvania Turnpike. Plaintiffs sought to enforce provisions

Lower courts, applying rules identical to that enunciated in *Spires*, have found nursing home patients to be third party beneficiaries of a state's Medicaid provider agreement. In *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689 (N. D. Ohio 1977), Ohio's Medicaid recipients residing at a private nursing home brought an action to enforce patient care standards under Ohio law. After reviewing the regulations in question, the court found sufficient intent to confer rights in patients as third party beneficiaries of the provider agreement. The court held at 697-98:

> Ohio law has long recognized that "a third person for whose benefit a promise has been made by another may maintain an action thereon at law in his own name," 11 O. Jur. 2d, Contracts § 176, at 425; see cases cited *id.* at n. 1. The State of Ohio, having elected to participate under Title XIX and to receive federal funds, is obligated to provide Medicaid services to qualified recipients in a manner consistent with federal law [citations omitted]. Defendant Manor Care's obligations under the state and federal law and regulations are contractual. Insofar as the provisions of the federal regulations found at 20 C. F. R. § 405.1121(k)(4) [now 42 C. F. R.] and 45 C. F. R. § 249.12(a)(1)(ii)(B)(4) [now 42 C. F. R. § 442.311 (4) (1978)] and of § 306.4 of the Ohio Medicaid Handbook reflect a duty owed to Ohio Medicaid patients by the state and by the participating providers of their care, enforceable by them within the administrative structure of the program, therefore, such recipients may maintain an action under a provider's agreement in accordance with the law of Ohio.[34]

See also *Roberson v. Wood*, 464 F. Supp. 983, 987 (E. D. Ill. 1979) [motions to dismiss denied where allegations that plaintiff-nursing home residents were third party beneficiaries of a provider agreement under the Illinois Medicaid program between nursing home and Illinois Department of Public Aid]; and *Berry v. First Healthcare Corp., Inc.*, [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶28,693 (D. N. H. 1977) [motions to dismiss denied as to counts in complaint which alleged that nursing home residents were third party beneficiaries of provider agreement under the New Hampshire Medicaid program between nursing home and State of New Hampshire].[35]

33. (Cont'd.)
contained in the leases between the Pennsylvania Turnpike Commission and the service station operators regulating the prices charged to the public. The court found members of the class to be third party beneficiaries of the leases, stating: "If the thrust of a contract between a governmental agency and a private party is for the benefit of individual members of the public, then a third-party benefit is created which can be enforced by a member of the public in the event of a breach by the private party." *Id.* at 140. Courts in other states have given like recognition to the contractual rights of third parties. See, *e.g.*, *Blair v. Anderson*, 10 Del. 94, 325 A. 2d 94 (1974), where a federal prisoner incarcerated in a state correctional facility brought action against the warden for negligence in permitting an assault on him by fellow prisoners. The Supreme Court of Delaware, in recognition of the statutory requirement that the Federal Bureau of Prisons provide, *inter alia*, "[s]afekeeping, care and subsistence", and "protection" for a prisoner [18 U. S. C. § 4042 (1970)], found the prisoner to be a third party beneficiary of the contract between Delaware and the United States which incorporated this statutory duty.

34. The statutory and regulatory provisions in question in *Fuzie* are virtually identical to those *sub judice*. *Compare* 28 Pa. Code § 201.34(h) *with* section 306.4 of the Ohio Medicaid Handbook which provides: "[Each Medicaid patient] is transferred or discharged only for medical reasons, or for his/her welfare or that of other patients, or for non-payment for his stay (except as prohibited by Title XIX Program); and given reasonable sure orderly transfer or discharge [sic]." *Fuzie*, 461 F. Supp. at 697.

35. HEW recognized that "legitimate claims of entitlement" may be based upon several sources including contract (HEW Brief at 25) but failed to address this issue. Had HEW done so, it would have quickly realized the want of analogy which it has attempted to draw between the Patients' rights and those of em-

The termination of the provider agreement would require the Patients to be transferred to another facility, thereby disrupting the care, services, and treatment required by the provider agreement. As the intent of both parties to this agreement is to benefit the Patients, the latter have legitimate contractual rights which are affected by the decision to terminate.[36] Process must therefore be afforded them prior to that decision.[37]

(b) The Statutory and Regulatory Scheme Grants Patients a Legitimate Claim of Entitlement to Remain at Town Court.

The Patients also have property rights which evolve from the statutory and regulatory scheme involved. In *Goldberg v. Kelly*, 397 U. S. 254 (1970), the Court developed an entitlement concept which required that process be granted to a welfare recipient prior to termination of his benefits. In reviewing the state's welfare statute, the Court found in its grant of benefits property interests sufficient to require observance of procedural due process:

35. (Cont'd.)
ployees of government contractors or other persons similarly situated. (HEW Brief at 15, 24 n. 32, 30) The latter could only be viewed as incidental beneficiaries possessing no property rights. See RESTATEMENT OF CONTRACTS §§ 133, 147; *see also Williams v. Paxson Coal Co.*, 346 Pa. 468, 31 A. 2d 69 (1943).

36. The Court has consistently held that due process must be afforded prior to a deprivation by the state of one's contractual rights. See, *e.g.*, *Perry v. Sindermann*, 408 U. S. 593 (1972) [possible implied contractual right to renewal of teaching contract gave rise to due process rights]; and *Fuentes v. Shevin*, 407 U. S. 67 (1972) [replevin of goods purchased under conditional sales contract implicated due process despite the fact the owner lacked full legal title].

37. Commentators have recognized that nursing home patients may be third party beneficiaries of provider agreements under the Medicaid program. Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 ARIZONA L. REV. 304, 352 (1975), and Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEORGETOWN L. J. 691, 715 (1977).

> [Welfare benefits] are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'.

8 It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. 397 U. S. at 262.

The Court subsequently had an opportunity to review the entitlement concept, which was explained by Justice Stewart:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[38]

Thus, the emphasis of the Court was the need to find some property right grounded in state law which could vest a legitimate claim of entitlement in the party seeking due process. Such a right for the Patients exists in Penn-

38. *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972). See also *Perry v. Sindermann*, 408 U. S. 593, 603 (1972) (Burger, C. J., concurring); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2103 (1979).

sylvania which has a long history, dating back to 1899, of providing free medical care to indigent persons. In 1923, Pennsylvania first adopted a program of providing free institutional medical care to indigent persons by means of payment to private institutions, including nursing homes.[39] In *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 76-77, 161 A. 697, 710 (1932), the Pennsylvania Supreme Court declared: "We again hold that the support of the poor . . . is and has always been a direct charge on the body politic for its own preservation and protection . . . . To hold that the State may not under the [Pennsylvania] Constitution now aid such people, even though it be a governmental duty, would be to deny to the State the right to perform not only an important, but, at this time, a most pressing governmental function." In *Kurtz v. Pittsburgh*, 346 Pa. 362, 380, 31 A. 2d 257, 264 (1943), the Pennsylvania Supreme Court similarly observed that "[i]t is always the duty of the state acting through appropriate agencies to take care of persons who are without means of support."

Skilled nursing care for the indigent has traditionally been one of the types of health care services recognized and funded by Pennsylvania. The program has been modified many times and in 1967 was replaced by Article IV of the Public Welfare Code, Pa. Stat. Ann. tit. 62, § 401 *et seq.*, which expressed the legislative intent to be:

> to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed, the assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion, or political affiliation; and that the assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. Pa. Stat. Ann. tit. 62, § 401.

See also 42 U. S. C. § 1396a(19).

Under the Medicaid program and Pennsylvania regulations a patient may be transferred or discharged from a skilled nursing facility only for cause—"for medical reasons or for his welfare or that of other patients, or for his nonpayment for his stay." 42 C. F. R. § 405.1121(k)(4) (1977); 28 Pa. Code § 201.34(h). See also 28 Pa. Code § 201.29(e); 28 Pa. Code § 201.30(b).[40]

In a number of situations less compelling than that now presented[41] the Court has found a property interest to require some form of process where the rights in question could be suspended only for cause. In *Perry v. Sindermann*, 408 U. S. 593 (1972), the Court held that a non-

39. For historical overview of Pennsylvania's implementation of its duty to provide health care to indigents, see, Shay, *Pennsylvania Law of Hospital Supervision: Its Origin and Present Meaning*, 51 TEMPLE L. Q. 187 (1978).

40. While one may understandably have no right to a hearing prior to one's admission to a nursing facility, once there, the right to affiliation with the institution becomes fixed, absent cause. As the Court has recognized "[T]here is a human difference between losing what one has and not getting what one wants." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2105 (1979), quoting from Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975), where the Court noted the crucial distinction between an initial grant of parole and its revocation.

41. The Court has previously recognized that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 259 (1974). In a footnote to the quoted material, the Court stated: "Similarly President Nixon has observed that '"[i]t is health which is real wealth," said Ghandi, "and not pieces of gold and silver."' Health, Message from the President, 92d Cong, 1st Sess, HR Doc No. 92-49, p. 18 (1971)."

tenured teacher who had been employed for a number of years should be given an opportunity to prove that the existence of rules and understandings, promulgated and fostered by state officials, gave the teacher a legitimate claim of entitlement to continued employment absent "sufficient cause," which cause could be challenged at a hearing. 408 U. S. at 599-603. Similarly, in *Arnett v. Kennedy*, 416 U. S. 134 (1974), the Court recognized that where by statute a non-probationary federal employee could be discharged only for cause, the employee had a property interest under the Due Process Clause and was entitled to some form of hearing as to the existence of cause. In *Memphis Light, Gas and Water Division v. Craft*, 436 U. S. 1, 9-11 (1978), the Court upheld a due process claim of entitlement to continued utility service since under Tennessee law a public utility could not terminate service at will but only for cause.

These factors are equally applicable to the rights of the Patients once they became residents of a skilled nursing facility. They, much like the teacher in *Sindermann*, or the federal employee in *Arnett*, or the customer in *Memphis Light, Gas and Water Division*, can only lose the right and entitlement to remain in the facility upon certain specified conditions, the existence of which they have a right to contest at a hearing. This factor was recognized by a majority of the Court of Appeals for the Third Circuit as giving the Patients a legitimate claim of entitlement to process prior to a termination of their residency.

Most courts which have considered similar issues are in accord with the holding of the Third Circuit. In *Bracco v. Lackner*, 462 F. Supp. 436 (N. D. Cal. 1978), elderly patient-residents at a joint skilled and custodial care facility brought a class action claiming that their health and

lives were endangered by an imminent cut-off of federal and state Medicaid benefits forcing their immediate removal without notice or opportunity for a hearing. In enjoining the cut-off of funds the court held that extension of nursing home benefits might create in the patients an interest in continued occupancy protected by the Due Process Clause; and that regulations providing that a patient may be "transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for non-payment for his stay," vested the patients with property interests in their continued occupancy. 462 F. Supp. at 452. *Accord, Feld v. Berger*, 424 F. Supp. 1356 (S. D. N. Y. 1976) [decided on non-constitutional grounds]; *Roberson v. Wood*, 464 F. Supp. 983 (E. D. Ill. 1978); *Stitt v. Manor Care, Inc.*, MEDICARE AND MEDICAID GUIDE (CCH) New Developments ¶ 29,409 (N. D. Ohio 1978); *Ivy Nursing Home, Inc. v. Califano*, [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 28,470 (W. D. Pa. 1977), *appeal dismissed by stipulation*, No. 77-2176 (3d Cir., Oct. 3, 1977); *Mabel Dunn Rest Home, Inc. v. Weinberger*, 9 Clearinghouse Review 200 (D. R. I., June 5, 1975). *Contra, Nicobatz v. Weinberger*, [1974-1976 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 27,427 (C. D. Cal. 1974) [no effort to prove transfer trauma].

3. The Patients Are Deprived of Life and Liberty by Decertification of Town Court and Their Transfer to Another Facility.

Petitioner asserts that "[t]his case raises the discrete question of whether Medicaid recipients have a *property interest* under that program . . . ." [Petitioner's Brief at 12; emphasis added]. HEW, in its brief, likewise observed

"[i]f the patients have *any* cognizable interest under the Due Process Clause, it is more aptly characterized as a property interest than as a liberty interest, and we will refer to it that way here" [HEW Brief at 22 n. 29; emphasis added].

These statements reflect a misunderstanding of the distinction between liberty and property. They also overlook *in toto* a distinct basis for which due process rights must be afforded—a deprivation of life.

The terms "life" and "liberty" include all personal—as distinguished from property—rights.[42] Over one hundred years ago, the distinction was succinctly stated:

> Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Property is everything which has exchangeable value . . . *Slaughter-House Cases,* 16 Wall. 36, 127, 21 L. Ed. 394, 425 (1872) (Swayne, J., dissenting).

And in *Meyer v. Nebraska,* 262 U. S. 390, 399 (1923), the Court observed that the notion of liberty comprises many basic rights indeed:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]

See also *Board of Regents v. Roth,* 408 U. S. 564, 573 (1972); *Kent v. Dulles,* 357 U. S. 116 (1958); *United States v. Laub,* 385 U. S. 475 (1967); *Bolling v. Sharpe,* 347 U. S. 497 (1954); *Griswold v. Connecticut,* 381 U. S. 479 (1965).

Decertification of Town Court and consequent removal of the Patients to another facility could cause transfer trauma, an increased possibility of untimely death or serious illness of elderly, infirm persons who are transferred from one location to another. It is a phenomenon which has been isolated and documented by medical and other experts, recognized by the courts, and acknowledged even by Petitioner and HEW.[43] The effects of transfer

42. Patients concede that the two interests may parallel each other. Regardless of the precise line of demarcation between liberty and property, *Lynch v. Household Finance Corp.,* 405 U. S. 538, 552 (1972), these two interests have a different content. *Compare, e.g., Bishop v. Wood,* 426 U. S. 341, 344-47 (1976) [discussion of property interest] *with Bishop v. Wood, id.* at 347-49 [discussion of liberty interest]; and *Goss v. Lopez,* 419 U. S. 565, 574 (1975) [discussion of property interest] *with Goss v. Lopez, id.* at 574-75 [discussion of liberty interest]. See also *Board of Regents v. Roth,* 408 U. S. 564, 571-78 (1972).

43. As to professional literature documenting the potential harmful effects of transferring elderly patients, see, *e.g.,* Hesselkus, *Relocation Stress and the Elderly,* 32 American Journal of Occupational Therapy 631 (Nov.-Dec. 1978); Zweig and Csank, *Mortality Fluctuations Among Chronically Ill Medical Geriatric Patients As An Indicator of Stress Before And After Relocation,* 24 Journal of American Geriatrics Society 264 (1976); Brand and Smith, *Life Adjustment and Relocation of the Elderly,* 29 Journal of Gerontology 336 (1974); Kral, Grad, and Berenson, *Stress Reactions Resulting From The Relocation of An Aged Population,* 13 Canadian Psychiatric Association Journal 201 (1968). As to courts which recognized the phenomenon see, *e.g., Klein v.*

trauma upon the patients of one nursing home were dramatically described in *Bracco v. Lackner,* 462 F. Supp. 436, 444 (N. D. Cal. 1978):

> . . . Of the 97 [patients], only 46 were placed in facilities in San Francisco; of these 46 patients six have died. Fifty-one patients were transferred to nursing homes outside of San Francisco . . . .
>
> The atmosphere at the Center in recent weeks has been one of fear and uncertainty . . . .
>
> * * *
>
> Patients and their friends or relatives have been found weeping with fear and distress . . . . In some instances patients have cried and shown signs of depression, following the removal of close friends who had been patients . . . .
>
> In some cases, supportive patient friendship have been undermined . . . .
>
> In another case, the patient did not survive the initial move between floors of the Center . . . .
>
> * * *
>
> Another patient, Ellis W., who suffered from advanced cardiovascular disease and diabetes, died just as significant numbers of patients had begun to be moved from the Center . . . .

43. (Cont'd.)
Mathews, 430 F. Supp. 1005, 1009 (D. N. J. 1977) [and cases cited therein]; *Greenwald v. Whalen,* 78 Civ. 2765—CSH, text at n. 13 (S. D. N. Y., Jan. 23, 1979) [judicial notice taken of the existence of transfer trauma]. As to Petitioner's acknowledgement of this problem, see *Brown v. Commonwealth of Pennsylvania, Department of Public Welfare,* — Pa. Commw. Ct. —, 401 A. 2d 616, 618 (1979). As to HEW's recognition of the same, see Technical Assistance Memorandum AoA-TA-75-1 (Feb. 19, 1975) [cited in *Klein v. Mathews,* 430 F. Supp. at 1009].

In the face of exposure to grave illness and even untimely death, the Patients are entitled at a minimum to "some form of hearing" before being uprooted. It falls squarely within the principle basic to our society that one has a right to be heard prior to being forced to suffer a grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction. *Mathews v. Eldridge,* 424 U. S. 319, 333 (1976); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring); *but see Ingraham v. Wright,* 430 U. S. 651, 672 (1977).

The decertification of Town Court and the transfer of the Patients to another nursing facility will inflict additional losses upon the Patients. Selection of a nursing home is often based on geographic proximity to family and friends. Affiliations with staff and fellow patients are developed. Both of these factors are invaluable to persons, such as the Patients, who are old and sick.[44]

The Court has noted that the right to associate freely, like freedom of speech, "lies at the foundation of a free society," *Shelton v. Tucker,* 364 U. S. 478, 486 (1960). The right of Patients to associate, or not to disassociate, with fellow patients and staff takes on many of the qualities which traditionally receive constitutional protection. The psychological and physical well-being which these associations provide to Patients are no less important than the right of organizations to channel their members to appropriate legal assistance, *NAACP v. Button,* 371 U. S. 415 (1963), and *Brotherhood of Railroad Trainmen v. Virginia,*

44. HEW's interpretive guidelines cite, as an example of the "welfare" of a patient, moving the patient so as to facilitate visits by relatives and friends. See p. 18, n. 23, *supra.* These factors have been given weight even in transfer of prisoner from one institution to another. See, *e.g., United States ex rel. Haymes v. Montayne,* 505 F. 2d 977, 981-82 (2d Cir. 1974), *rev'd on other grounds* 427 U. S. 236 (1976); *Stone v. Egeler,* 377 F. Supp. 115, 117-18 (W. D. Mich. 1973).

374 U. S. 1 (1964); or the right to union association without prior restriction. *Thomas v. Collins*, 323 U. S. 516 (1945). The "emotional attachments that derive from the intimacy of daily association," recognized by the Court in the foster parent-child relationship, *Smith v. Organization of Foster Families For Equality and Reform*, 431 U. S. 816, 844 (1977), are similarly present in the relationship among Patients and staff. That association is embraced in fundamental concepts of liberty and should not be regarded with indifference, as manifested by the approach of Petitioner and HEW.

4. Patient Input Prior to Decertification Will Not Thwart Federal Policy and Will Reduce the Risk of an Erroneous Deprivation of Life, Liberty, and Property.

Even assuming that the Patients have rights of constitutional dimension, Petitioner and HEW contend that the administrative burdens imposed by pre-termination hearings would "invite administrative paralysis. . . ." (Petitioner's Brief at 11; HEW Brief at 38-39). Although this argument has been raised at each level of this case, no evidence has been offered to support it.

To the contrary, examination of unpublished HEW data (summarized in appendix to brief A1-A3), shows that since 1974, nationwide, there have been an average of forty involuntary terminations of skilled nursing facilities each year from which approximately two appeals were filed annually with HEW.[45] Even if intermediate care facility

45. These numbers may be reduced further if terminations resulting from violation of the *Life Safety Code*, not in issue here, are omitted. See, *e.g.*, *Caton Ridge Nursing Home, Inc. v. Califano*, 596 F. 2d 608 (4th Cir. 1979) (per curiam); *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978); *Case v. Weinberger*, 523 F. 2d 602 (2d Cir. 1975). However, the HEW records studied do not disclose the basis for decertifications.

terminations are also considered, the average number of terminations per year increases only to seventy-five and the number of appeals to four. This de minimis[46] administrative burden should be easily borne with little or no impact on the administration of the Medicaid program.

No process is at present afforded patients prior to decertification.[47] The input of patients is minimal, uncertain, and indirect at best, occurring solely during sporadic nursing home surveys. Petitioner and HEW argue, however, that this is somehow sufficient because survey teams are required to seek the views of patients during compliance surveys. This argument overlooks the fact that there is no evidence in this record that any interviews occurred during the surveys pertinent to the decertification decision before the Court [see n. 14, *supra*]. Further, as indicated by the study of HEW decertifications summarized above, in the overwhelming number of instances provider agreements are renewed.

When a tentative decision to decertify is made, patients should be given notice and an opportunity to be heard, as they have little or no means of knowing during the course of a survey whether or not decertification and ultimate involuntary transfer is truly at risk.[48] Furthermore, a probability exists that some patients who

46. In contrast, the total number of Social Security appeals are in the tens of thousands, *White v. Mathews*, 434 F. Supp. 1252, 1254 and n. 4 (D. Conn. 1976) [backlog of pending appeals in excess of 87,000 nationally], *aff'd* 559 F. 2d 852 (2d Cir. 1977), *cert. denied sub-nom. Califano v. White*, 435 U. S. 908 (1978). *See also Richardson v. Perales*, 402 U. S. 389, 406 (1971) [over 20,000 disability claims hearings annually].

47. But see argument, *infra*, pp. 46-48.

48. California uses a two-step decertification process with two inspections. Under such a system, patients could receive notice of threatened transfer. *Paramount Convalescent Center, Inc. v. Department of Health Care Services*, 15 Cal. 3d 489, 125 Cal. Rptr. 265, 542 P. 2d 1, 5-6 (1975), *cert. denied*, 425 U. S. 992 (1976).

may wish to assert their views, or have their views asserted on their behalf, may not be among those chosen for interview. Moreover, to the extent patients are interviewed the type of information solicited may fall short of being truly meaningful in respect to their interests [see n. 14, *supra*].

HEW concedes that the "decision to terminate . . . a nursing home may be important to patients" [HEW Brief at 17], and represents that it "plans to initiate rulemaking in the near future to consider what further procedures may be appropriate for patient participation in the survey and termination process" [HEW Brief at 37]. Nevertheless Petitioner and HEW attack Judge Adams' conclusion below that the Patients' views should be presented with the disturbing argument that:

> [t]he concurring opinion [Adams, J.] assumes that the patients would be competent to offer relevant information on the issue of whether or not the nursing home is in compliance with the requirements of the program. However, the conditions of participation for nursing homes in the Medicaid program are, of necessity, technical matters requiring expert evaluation. In these areas, the patients' opinion certainly will not significantly reduce the risk that the government will make a mistake in assessment of the nursing home's compliance. . . . [Petitioner's Brief at 19] [49]

HEW takes the same view [HEW brief at 39-40].

49. This Court has previously recognized that "a primary function of legal process is to minimize the risk of erroneous decisions." *Mackey v. Montrym*, 47 U. S. L. W. 4798, 4801 (June 26, 1979); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2106 (1979). Therefore, consideration should be given to likelihood of an erroneous deprivation of the private interest as a consequence of the procedures used. *Mackey, supra; Mathews v. Eldridge*, 424 U. S. 319, 335 (1976). The possibility

The fact that some patients may not be competent to offer relevant information is of no consequence to their right to a hearing. Pennsylvania's patient bill of rights specifically permits appointment of a guardian for an incompetent patient, one who is medically incapable of understanding his rights, or one who exhibits a communication barrier. 28 Pa. Code § 201.34(v). The need to consider this approach is particularly appropriate in this case where the basis for the decertification relates to patient care of extremely ill persons. The situation is unlike that presented in *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978), and *Caton Ridge Nursing Home, Inc. v. Califano*, 596 F. 2d 608 (4th Cir. 1979) (per curiam), in which the alleged deficiencies concerned violations of the *Life Safety Code* where patient input is understandably of limited value.

The district court in *Klein v. Mathews*, 430 F. Supp. 1005, 1011 (D. N. J. 1977), categorically rejected the view presented by Petitioner and HEW, stating: "it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. . . ." Similarly Judge Adams recognized that:

49. (Cont'd.)
of erroneous decisions occurring and the need for representation of patient's interests in that decision is manifest inasmuch as the multiple layers of regulation applicable to nursing homes have been described as "a Serbonian bog." *Feld v. Berger*, 424 F. Supp. 1356, 1357 (S. D. N. Y. 1976). Circuit Judge Friendly has stated that "there has developed a degree of complexity in the Social Security Act and particularly the regulations which make them almost unintelligible to the uninitiated." *Friedman v. Berger*, 547 F. 2d 724, 727 n. 7 (2d Cir. 1976). See appendix to brief, A2-A3, where three reversals are reported in the six decertification decisions decided on the merits.

> The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interest. If a patient is too sick to participate, he may be too sick to be transferred, and the investigator should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives who should be notified of such opportunity. 586 F. 2d at 294.[50]

The input of a party seeking process is particularly appropriate where the governmental procedures create an undue risk of an erroneous deprivation. *Califano v. Yamasaki,* 61 L. Ed. 2d 176 (1979). Therefore, "[i]n view of the discretionary nature of a decision to decertify an institution . . .",[51] no substantial reasons exist why patients should not have input into a decision which so vitally affects their well-being and lives. Only then can the risk of erroneous decisions to decertify be minimized.[52]

50. The issue of appropriate representation for the nursing home resident has been discussed elsewhere. *Yaretsky v. Blum,* 592 F. 2d 65, 68 (2d Cir. 1979) [state under obligation to provide representation for patient in certain instances]; *Burchette v. Dumpson,* 387 F. Supp. 812, 818 (E. D. N. Y. 1974). Representatives of patients could, at minimum, inspect the survey reports, a right which is well established. See, *e.g., Stretch v. Weinberger,* 495 F. 2d 639 (3d Cir. 1974). Further, interested and responsible citizens have the right under Pennsylvania regulations to enter nursing homes to consult with patients. 3 Pa. Bulletin 76, 1105 (1973); Comment, *Nursing Home Access: Making the Patient Bill of Rights Work,* 54 J. URBAN L. 473, 479 (1977).

51. This was specifically recognized by Judge Adams, noting that "[t]he distinction between qualified and unqualified homes is not marked by a bright line." 586 F. 2d at 293.

52. If Town Court were certified only under the Pennsylvania Medical Assistance Program, a pretermination hearing would be provided by Pennsylvania practice and patient participation would be permitted. Likewise, if Town Court's license was being threatened, it also would receive a pretermination hearing and patient participation would be permitted. Here, Town Court, which had no Medicare patients at the time of decertification, was barred from a pretermination hearing because of its joint certification. Although the law is not clear on the issue, it is likely that if Town Court now chose to withdraw from Medicare it would receive a pretermination hearing from the state authorities. This difference in treatment of Pennsylvania Medical Assistance patients between those in homes certified only under that program and those in homes which are jointly certified is arbitrary and further indicates the failure of Petitioner to recognize the Patients' rights.

Our most fundamental concepts of life and liberty require that process be afforded to the Patients, giving them the opportunity to avoid the spectre of transfer trauma as documented in *Bracco.* The concern of Petitioner and HEW for increased administrative costs[53] weighs lightly against this exposure. As the Court noted in *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976):

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision . . . .
>
> • • •
>
> But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of de-

53. See discussion at pp. 40-41 *supra,* and study contained in appendix to this brief. (A1-A3)

cisionmaking in all circumstances. *The essence of due process is the requirement that "a person in jeopardy of* serious loss *[be given] notice of the case against him and opportunity to meet it."* [54] [Emphasis added; citation omitted.]

D. Transfer Trauma Incident to Removal of the Patients to Another Facility Results in Reduction in Assistance Requiring That Notice and a Hearing Be Given the Patients.

Under the existing statutory and regulatory scheme, the Patients must be given notice and a hearing for any action by Petitioner which causes a reduction in their assistance. 45 C. F. R. § 205.10(a)(5) (1977). The uncontradicted testimony of a medical expert in the district court shows that, as alleged in their complaint (A. 11a), the Patients' involuntary transfer from Town Court constitutes a reduction of assistance sufficient to trigger the notice and hearing requirements. The testimony established that transfer of the Patients to another facility could cause "transfer trauma," resulting in serious illness or death. (A. 253a) In *Klein v. Mathews*, 430 F. Supp. 1005 (D. N. J. 1977), the district court concluded that the prospect of transfer trauma caused a reduction in assistance requiring a pretermination hearing, stating that "it would be a callous disregard of the real life consequences to say that a Medicaid patient who suffers transfer trauma is receiving the same benefits under Title XIX as a patient not forced to similarly suffer . . . ." *Id.* at 1010.

54. In *Mathews*, the Court held that a disability benefits claimant was not entitled to a hearing before initial termination of benefits because existing administrative procedures fully comport with due process. There, claimant was afforded two sets of review processes and a conference before termination. Further, claimant had the opportunity of submitting additional evidence at each stage of the proceedings dealing with the one question involved, the extent of his physical disability. During that process he never appealed the adverse decisions to an administrative law judge for a full hearing, even though he could have done so. In some measure at least, the Court's holding was a product of this failure to seek on a post-termination basis the very hearing which claimant was seeking, as a constitutional right, on a pre-termination basis. Further, the Court considered the alternative to a pre-termination hearing as acceptable. The claimant was protected, in theory at least, from complete deprivation by existence of the separately funded government welfare program.

No such administrative due process was afforded here; likewise, no such protection from deprivation is available here. The reliance by Petitioner and HEW on *Mathews* is, therefore, misplaced.

In its brief, HEW takes issue with this finding, asserting without citation: "[t]he 'assistance' referred to by the regulation is the monetary amount of benefits, not the psychic welfare that the benefits provide . . ." (HEW Brief at 27 n. 37). HEW regulations do not define "assistance"; however, HEW's own guidelines, interpreting its patient rights regulations restricting transfers of patients from skilled nursing facilities harmful to their welfare, define "welfare" to include the patients' social and emotional well-being. See p. 18, n. 23, *supra*.

Further, Petitioner, the party immediately responsible for implementing 45 C. F. R. § 205.10(a)(5) (1977), is guided by Pennsylvania's Public Welfare Code which defines "assistance" as follows:

> money, *services, goods, shelter, burial* and medical, chiropractic *and other health care,* including nursing home care provided from or *with state, federal, county, county institutions, district or municipal funds,* for needing persons who reside in Pennsylvania and need assistance to provide for themselves and their dependents *a decent and healthful standard of living,* and for needy, homeless or transient persons. Pa. Stat. Ann. tit. 62, § 402. [emphasis added.]

This definition supports the contention that a patient forced to move and confronted thereby with serious illness or death suffers a reduction of "assistance"—"services . . . [or] other health care . . . to provide . . . a healthful standard of living." *See Brown v. Commonwealth of Pennsylvania, Department of Public Welfare,* — Pa. Commw. Ct. —, 401 A. 2d 616, 618 (1979) [consideration of "non-medical factors such as friendships, psychological dependence and social behavior"]. Because of this threatened reduction the Patients are entitled to pretermination process. *See Bracco v. Lackner,* 462 F. Supp. 436, 457 (N. D. Cal. 1978).

VI. CONCLUSION.

The Patients face grave consequences if Town Court is decertified and they are forced to move. At a minimum a hearing should be provided the Patients at which they may state their reasons why their nursing home should not be decertified, so that in turn they may remain in an environment which they chose, found hospitable, and desire not to leave.

In light of the conclusion of the district court "that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing" (A. 531a), the admonition of Justice Brandeis in his dissent in *Olmstead v. United States,* 277 U. S. 438 (1928), is especially pertinent:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

Id. at 479 (footnote omitted).

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully sumitted,

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August, 1979.

Appendix.

INVOLUNTARY TERMINATIONS OF SKILLED NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES, 1974-1978.[1]

Year	*Facility Type*	*Number of Involuntary Terminations*
1974		
	Skilled Nursing Facilities (Title XVIII)*	21
	Skilled Nursing Facilities (Title XIX only)	Not Available
	Intermediate Care Facilities	Not Available
1975		
	Skilled Nursing Facilities (Title XVIII)*	14
	Skilled Nursing Facilities (Title XIX only)	47 (est.)
	Intermediate Care Facilities	4 (est.)
1976		
	Skilled Nursing Facilities (Title XVIII)*	10
	Skilled Nursing Facilities (Title XIX only)	8 (est.)
	Intermediate Care Facilities	90 (est.)
1977		
	Skilled Nursing Facilities (Title XVIII)*	19
	Skilled Nursing Facilities (Title XIX only)	13
	Intermediate Care Facilities	12
1978		
	Skilled Nursing Facilities (Title XVIII)	21
	Skilled Nursing Facilities (Title XIX only)	37
	Intermediate Care Facilities	28

1. Data supplied by Data Management Branch, Division of Field Operations, Health Care Finance Administration, U. S. Dep't of Health, Education, and Welfare, July 25, 1979 and Aug. 3, 1979.

* Includes facilities, such as Town Court, which are certified under both Title XVIII (Medicare) and Title XIX (Medicaid).

HISTORY OF SOCIAL SECURITY ADMINISTRATION APPEALS FROM INVOLUNTARY TERMINATIONS OF SKILLED NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES, 1968-1979.[1]

Total Number of Facilities Filing Appeals From Involuntary Decertifications 48
Total Number of Facilities for Which Information Is Available With Respect to Disposition of Appeals 23
Appeal Abandoned or Withdrawn 5
Appeal Dismissed 2
Decertification Upheld 3
Decertification Reversed 3
Decision Rendered (Outcome Unknown) 10
Time Period Elapsed Between Date of Request for Hearing and Date Decision Rendered on Appeal.*

Provider Series Docket No.	*Year Hearing Requested*	*Year Decided*	*Disposition*	*Years Elapsed*
18	1968	1979	Unknown	11
23	1968	1979	Upheld	11
25	1968	1979	Upheld	11
65	1971	1978	Abandon	7
87	1973	1977	Withdrawn	4
91	1974	1976	Dismissed	2
94	1974	—	Pending	5
102	1975	1978	Withdrawn	3
111	1976	1977	Untimely	1
119	1976	1979	Reversed	3
121	1976	1978	Upheld	2
123	1976	1977	Withdrawn	1
129	1976	1979	Reversed	3
136	1977	1979	Unknown	2
144	1977	1978	Unknown	1

1. Information obtained from Office of Chief Administrative Law Judge, Social Security Administration, U. S. Dep't of Health, Education, and Welfare, Aug. 3, 1979.

* This data is available only for nineteen appeals.

Time Period Elapsed Between Date of Request for Hearing and Date Decision Rendered on Appeal (Continued).

Provider Series Docket No.	*Year Hearing Requested*	*Year Decided*	*Disposition*	*Years Elapsed*
153	1978	1978	Unknown	0
155	1978	1979	Withdrawn	1
157	1978	1979	Reversal	1
162	1979	1979	Unknown	0

Average Period From Year Hearing Requested Until Decision Rendered ..... 3.6 Years
(excluding Nos. 18, 23 and 25) ..... 2.25 Years

UNITED STATES CONSTITUTION.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C.

§ 1396a. State plans for medical assistance—Contents.

(a) A State plan for medical assistance must—

* * *

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

45 C. F. R.

§ 205.10. Hearings.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI or XIX of the Social Security Act shall provide for a system of hearings under which:

* * *

(5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

(i) A request for a hearing is defined as a clear expression by the claimant (or his authorized representative acting for him), to the effect that he wants the opportunity to present his case to higher authority. The State may require that such request be in written form in order to be effective;

(ii) The freedom to make such a request shall not be limited or interfered with in any way. The agency may assist the claimant to submit and process his request;

(iii) The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;

(iv) Agencies may respond to a series of individual requests for hearing by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law. In all group hearings, the policies governing hearings must be followed. Thus, each individual claimant shall be permitted to present his own case or be represented by his authorized representative;

(v) The agency may deny or dismiss a request for a hearing where it has been withdrawn by the claimant in writing, where the sole issue is one of State or Federal law requiring automatic grant adjustments for classes of recipients, where a decision has been rendered after a WIN hearing before the manpower agency that a participant has, without good cause, refused to accept employment or participate in the WIN program, or has failed to request such a hearing after notice of intended action for such refusal, or where it is abandoned. Abandonment may be deemed to have occurred if the claimant, without good cause therefor, fails to appear by himself or by authorized representative at the hearing scheduled for such claimant.

HEW INTERPRETIVE GUIDELINES AND SURVEY PROCEDURES FOR THE APPLICATION OF THE CONDITIONS OF PARTICIPATION FOR SKILLED NURSING FACILITIES.

STANDARD *

(4) Is transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for non-payment for his stay (except as prohibited by titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge, and such actions are documented in his medical record;

INTERPRETIVE GUIDELINES

1. The term "transfer" applies to the movement of a patient from one location to another within a facility, as well as movement to another facility.
2. "Medical reasons" for transfer or discharge are based on the patient's needs and are determined and documented by a physician. Movement may be required to provide a different level of care.
3. "Welfare" of a patient or that of other patients refers to their social or emotional well being. This is a complex concept in that assessment can vary with each individual patient, facility, and surveyor. An example of moving a patient for his welfare is to facilitate visits by relatives and friends. A patient might also be transferred or discharged because his behavior poses a continuing threat to himself (i.e., suicidal) or to the well being of other patients (e.g., his behavior is incompatible with their needs and rights).

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* 42 C. F. R. § 405.1121(k)(4).

4. Non-payment for services rendered may be a legitimate reason for transfer or discharge. However, it is important to note that Title XVIII and XIX have special regulations dealing with patients' fiscal responsibilities.

SURVEY PROCEDURES

1. The surveyor reviews policies and procedures regarding transfer and discharge, and the mechanism for providing the patient reasonable advance notice, and verifies that they are implemented.

PA. STAT. ANN. TIT. 62.

§ 401. Legislative intent.

It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. 1967, June 13, P. L. —— , No. 21, art. 4, § 401.

§ 402. Definitions.

As used in this article:

"Assistance" means money, services, goods, shelter, burial and medical, chiropractic and other health care, including nursing home care provided from or with State, Federal, county, county institution, district or municipal funds, for needy persons who reside in Pennsylvania and need assistance to provide for themselves and their dependents a decent and healthful standard of living, and for needy, homeless or transient persons.

* * *

§ 441.1. Persons eligible for medical assistance.

The following persons shall be eligible for medical assistance:

(1) Persons who receive or are eligible to receive cash assistance grants under this article;

(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act;[1] and

(3) The medically needy.

1967, June 13, P. L. 31, art. IV, § 441.1, added 1968, July 31, P. L. 904 No. 273, § 5.

§ 442.1. The medically needy; determination of eligibility.

A person shall be considered medically needy if he:

(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living.

1967, June 13, P. L. 31, art. IV, § 442.1, added 1968, July 31, P. L. 904, No. 273, § 5.

§ 443.1. Medical assistance payments for institutional care.

The following medical assistance payments shall be made in behalf of eligible persons whose institutional care is prescribed by physicians:

* * *

1. 42 U. S. C. A. § 1396 et seq.

(3) Rates on a cost-related basis established by the department for skilled nursing home or intermediate care in a non-public nursing home, when furnished by a nursing home licensed or approved by the department and qualified to participate under Title XIX of the Federal Social Security Act;

* * *

28 PA. CODE.

§ 201.29. Admission policy.

(a) A nursing facility shall not obtain from or on behalf of patients any release from liabilities or duties imposed by the general law or these regulations except as part of formal settlement in litigation.

(b) A nursing facility shall admit only those patients whose nursing care and physical needs can be provided by the staff and facility.

(c) A patient who becomes mentally disturbed after admission and who may cause injury to himself or others may be treated in the facility by appropriate medical management and supervision. If the patient cannot be managed, immediate arrangements shall be made by the attending physician for the transfer of the patient to an appropriate facility at the earliest practical time.

(d) As changes occur in the patient's physical condition which necessitates a change in care which the facility is not prepared to give, immediate arrangements must be made to have the patient transferred to another appropriate facility which can care for the patient.

(e) When a patient's condition changes it is not necessary to transfer a patient within or between facilities when, in the opinion of the attending physician, such transfer might be harmful to the physical and mental health of the patient. The physician must document accordingly on the patient's record.

(f) Patients with any disease in the communicable stage shall not be admitted to the facility.

(g) Patients, who in the opinion of a qualified physician, are not infectious and are receiving appropriate antituberculosis chemotherapy may be admitted to the facility.

(h) A patient who develops a communicable disease after admission shall be medically isolated from other patients. If he cannot or should not be managed in the facility, immediate arrangements shall be made by the attending physician for the transfer of the patient to an appropriate facility at the earliest practical time.

(i) The fact that a patient develops a communicable disease after admission shall be reported to the appropriate health agencies and Regional Offices.

(j) When a communicable disease develops, adequate steps shall be taken to determine the source and degree of dissemination of the disease.

§ 201.30. Discharge policy.

(a) There shall be a centralized coordinated discharge plan to ensure that each patient has a program of needed continuing care both during his stay and after discharge from the facility. This plan must be developed within seven days of admission.

(b) Except in an emergency, a patient shall not be transferred or discharged from the facility without prior notification of next of kin or sponsor. Suitable clinical notes, list of orders, and all medications as directed by the attending physician shall accompany the patient if he is sent to another medical facility.

(c) If the person transferred or discharged from the facility is a patient of the Base Service Unit, the Base Service Unit shall be notified and consulted in advance of any transfer or discharge.

(d) The facility shall maintain written arrangements with one or more general hospitals and skilled nursing facilities under which such institutions agree to timely acceptance, as patients thereof, of acutely ill patients of

the intermediate care facility who are in need of hospital or skilled nursing facility care.

(e) A facility that has multi-level care does not need to have a transfer agreement with an outside facility of that level of care, but must have clearly defined procedures for the transfer of a patient from one level of care to another.

§ 201.34. Patient and employe rights.

(a) The governing body of the facility shall establish written policies regarding the rights and the responsibilities of patients and through the administrator is responsible for development of and adherence to procedures implementing such policies.

(b) These policies and procedures shall be made available to patients, to any guardians, next of kin, sponsoring agency or responsible person.

(c) There shall be available to staff, patients, consumer groups, and interested public, policies of the facility, including a written outline of its objectives and a statement of the rights of its patients. This policy must set forth the rights of the patients and prohibit mistreatment and abuse of the patient.

(d) The staff of the facility shall be trained and involved in the implementation of these policies and procedures.

(e) The patient or a legally responsible representative or both, or in the case of a Medical Assistance recipient, the recipient or the relevant County Board of Assistance in the absence of a legally responsible representative or both, shall be informed verbally and in writing prior to or at the time of admission and during his

stay, of service available in the facility and of related charges not covered by the basic *per diem* rate of the facility.

(f) The patient shall be fully informed as evidenced by the written acknowledgment of the patient prior to or at the time of admission and during stay of these rights and of all rules and regulations governing patient conduct and responsibilities.

(g) The physician shall inform the patient of his medical condition unless it is medically contraindicated, as documented in the medical record, and is afforded the opportunity to participate in the planning of his medical treatment. The patient has the right to refuse to participate in experimental research.

(h) The patient shall be transferred or discharged only for medical reasons or for his welfare or that of other patients or for nonpayment for his stay. The patient is given reasonable advance notice to ensure orderly transfer or discharge. Such actions are documented in the medical record of the patient.

(i) The patient is encouraged and assisted throughout his period of stay to exercise his rights as a patient and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff or to outside representatives of his choice or both. In addition, the patient shall be made aware of the Governor's Action Line (Toll Free 800 932-0784) to which the patient may address grievances when he or she feels they will not be properly resolved through the grievance machinery of the facility.

(j) The patient shall be free from restraint, interference, coercion, discrimination, or reprisal.

(k) The patient may manage his personal financial affairs.

(l) If the facility accepts the responsibility for the financial affairs of the patient, the patient must designate the transfer of responsibility in writing. Further, the facility must give the patient an accounting of all financial transactions made on the behalf of the patient. This accounting must be done at least quarterly.

(m) The patient shall be free from mental and physical abuse and free from chemical and, except in emergencies, physical restraints except as authorized in writing by a physician for a specified and limited period of time or when it is necessary to protect the patient from injury to himself and to others.

(n) The patient shall be assured confidential treatment of his personal and medical records and may approve or refuse their release to any individual outside the facility, except in case of his transfer to another health care institution or as required by law or third party payment contract.

(o) The patient shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

(p) The patient shall not be required to perform services for the facility that are not included for therapeutic purposes in his plan of care.

(q) The patient shall be permitted to associate and communicate privately with persons of his choice. The patient shall be permitted to send and receive his personal mail unopened, unless medically contraindicated as documented by his physician in the medical record.

(r) The patient shall be permitted to participate in social and religious activities.

(s) The patient shall be permitted to meet with community groups at his discretion unless medically contraindicated, as documented by his physician in his medical record.

(t) The patient shall be permitted to retain and use his personal clothing and possessions as space permits unless to do so would infringe upon rights of other patients and unless medically contraindicated, as documented by his physician in his medical record.

(u) If married, the patient is assured privacy for visits by his or her spouse. If both are patients in the facility, they are permitted to share a room unless medically contraindicated, as documented by the attending physician in the medical record.

(v) All rights and responsibilities specified in paragraphs (f), (g), (h), and (i) devolve to the guardian of such patient, next of kin, sponsoring agency, or representative payee in the following instances:

(1) A patient adjudicated incompetent in accordance with Commonwealth law.

(2) A patient who is found by his physician to be medically incapable of understanding these rights.

(3) A patient who exhibits a communication barrier.

(w) The aforementioned patient rights shall be reflected in the policies and procedures of the facility.

(x) No employe shall be punished or harassed by the facility or by its agent because of the efforts to avail himself of his rights.

(y) There shall be written policies that provide for the registration of employe complaints without threat of discharge or other reprisals.

(z) This section of the Long Term Care Facilities Regulations (28 Pa. Code § 201.34) entitled, "Patient and Employe Rights" shall be posted in a highly conspicuous place which is visible to the patients and employes.

§ 201.35. Access Requirements.

(a) Visiting hours shall consist of a minimum of eight hours per day during the period of 8 a.m. and 8 p.m.

(b) Visiting hours shall be posted in a conspicuous and public place.

(c) The facility shall permit members of recognized community organizations and representatives of community legal service programs whose purposes include rendering assistance without charge to patients to have access to the facility.

(d) The facility may limit access where it may be a detriment to the care and well being of the patient or patients in the facility. At no time may the facility restrict the right of the patient to have legal representation.

(e) The purpose of these visits may be to:

(1) Visit, talk with, and make personal, social and legal services available to all patients.

(2) Inform patients of their rights and entitlements and their corresponding obligations, under Federal and State laws by means of distribution of educational materials and discussion in groups and with individual patients.

(3) Assist patients in asserting their legal rights regarding claims for public assistance, medical assistance, and Social Security benefits, as well as in all other matters in which patients are aggrieved. Assistance may be provided individually, as well as on a group basis, and may include organizational activity as well as counseling and litigation.

(4) Engage in all other methods of assisting, advising, and representing patients so as to extend to them the full enjoyment of their rights.

(f) Persons entering a facility pursuant to this subsection shall promptly advise the administrator or other available agent of the facility of their presence.

(g) Such person shall not enter the living area of any patient without identifying themselves to the patient and without receiving the patient's permission to enter.

(h) Individual patients shall have the complete right to terminate any visit by persons having access pursuant to subsection (c) of this section. Communications between a patient and such persons shall be confidential unless the patient authorizes the release of such information.

(i) The facility shall post in a conspicuous place near the entrances and on each floor of the facility, a notice which sets forth the policy intent of these access regulations. The facility shall on admission, or in the case of a person who is already a patient in the facility or within 48 hours of the effective date of this regulation, provide every patient with a personal copy of such notice. In the case of a patient who for any reason cannot either read, write or understand English, arrangements shall be made to have an interpreter explain this policy to the patient.

(j) A certification of the provision of personal notice as required herein shall be entered in the patient's medical record.

(k) The Department need not be joined as Plaintiff in an action brought to enforce these access regulations.

(l) Nothing in this subsection shall be construed to restrict any right or privilege of any nursing home patient to receive visitors who are not representative of community organizations or legal services programs.

DPW-OMP-MA MANUAL.

9424.6 Skilled Nursing Facility Participation Requirements.

Nursing facilities desiring to participate in the Skilled Nursing Facility Care and Services Program under Title XIX, Medical Assistance, must meet the following requirements:

1. *State Licensure or Approval*

a. A proprietary, non-proprietary or hospital-based skilled nursing facility must be licensed or approved by the Department of Health. A skilled nursing facility certified for Title XVIII is automatically eligible to participate in the Medical Assistance Program.

* * *

2. *Licensed Administrator*

Be under the supervision of a Nursing Home Administrator, licensed by the State Board of Nursing Home Administrators, who is qualified by training and experience for successful operation of a nursing home and who has the necessary authority and responsibility for management of the facility.

3. *Certification Requirements*

a. Meet such provisions of the *Life Safety Code* of the National Fire Protection Association, 21st Edition, 1967, as are applicable to nursing facilities.

b. Have in effect a *Utilization Review Plan and Committee* to evaluate skilled nursing facility patients and related medical services provided in the facility.

c. Provide a statement of full *Disclosure* of *Ownership* for each person having directly or indirectly an ownership interest of 10 per cent or more in the nursing facility. In case a nursing facility is organized as a corporation, the name of each officer and director of the corporation; and in the case of a partnership, the name of each partner. Any changes which would effect the current accuracy of this information must be reported immediately.

d. Have a written *Transfer Agreement* (see Appendix VII) with one or more general hospitals to provide needed diagnostic and other services to patients of the nursing facility, and under which acutely ill patients may be transferred to the hospital ensuring timely admission.

e. Be in compliance with Section 601 of Title VI of the *Civil Rights Act* of 1964 which provides: "No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

f. Have and maintain an *Organized Nursing Service* which is under the direction of a professional registered nurse, who is employed full time by the skilled nursing facility, and which is composed of sufficient nursing and auxiliary personnel to provide adequate and properly supervised nursing services for patients during all hours of each day and all days of each week.

g. Have satisfactory arrangements for *Professional Planning* and *Supervision* of *Menus* and *Meal Service.*

h. Meet conditions relating to *Environment* and *Sanitation* as are applicable to extended care facilities under Title XVIII, Medicare of the Social Security Act.

i. Have satisfactory policies and procedures relating to maintenance of medical records, dispensing and administering of drugs and biologicals, and to physician coverage and emergency medical attention.

4. *Medical Assistance Provider Agreement*

Enter into a *Written Provider Agreement* (see Appendix VIII) with the Department of Public Welfare relating to the provision of services and making of payments. The Department's agreement with a facility will not exceed a period of one year. Execution of a new agreement shall be contingent upon a determination of continued compliance with standards under the provisions of the program.

In the case of any skilled nursing facility determined to be only in "substantial" compliance, as opposed to "full" compliance, the Department's agreement will not exceed a period of 6 months.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
MEDICAL ASSISTANCE PROGRAM
SKILLED NURSING HOME CARE AGREEMENT.

This AGREEMENT entered into by and between the Office of Medical Programs of the Department of Public Welfare, hereinafter referred to as the "Department" and the , as the provider of service, hereinafter referred to as the "Nursing Home."

WITNESSETH:

WHEREAS, the Public Welfare Code, Act 21 of June 13, 1967, P. L. 31, Article IV, provides for skilled nursing home care in private, public, or non-profit facilities, and

WHEREAS, Chapter II of Rules and Regulations of the Social and Rehabilitation Service, Department of Health, Education and Welfare on Standards for Payment for Skilled Nursing Home Care, Part 249.33 (a) (2) require an Agreement between the Department and a facility to provide skilled nursing home care and receive payments under the Medical Assistance Program.

Now, THEREFORE, the parties mutually agree as follows:

A. *Nursing Home Responsibilities*

The Nursing Home agrees to fulfill or meet the following requirements as a basis for participation in the Department's Programs:

1. Meet Federal and State Standards and Requirements for Skilled Nursing Home Operation and Care and be certified to participate as a provider of extended care under Title XVIII or be approved and licensed by the Department to operate a Skilled Nursing Home. Out-of-State

nursing homes are approved by the licensing or supervising authority of that state.

2. Provide Department's patients with facilities, care services and treatment suitable to their illness and of comparable quality with care provided to persons in other circumstances and without regard to the source of the payment for their care.

3. Agree that in the performance of this Agreement that there will be no discrimination against any employee or other person, on account of race, color, sex, ancestry, age, or national origin, and that the Commonwealth upon receipt of evidence of such discrimination shall have the right to cancel this Agreement. The Nursing Home agrees to comply with the requirements of Title VI of the Civil Rights Act of 1964.

4. Will have a Nursing Home Administrator licensed by State Board of Examiners of Nursing Home Administrators.

5. Promptly notify the appropriate County Assistance Office of the Department of any known change in a Department's patient income, eligibility, or living status.

6. Have a written Transfer Agreement with one or more general hospitals with effective arrangements for the transfer of patients and/or prompt availability of diagnostic and other outpatient services as may be requested by the attending physician.

7. Maintain complete and accurate records for Department's patient as set forth in the Rules and Regulations pertaining to Nursing Homes; permit the Department or its agents to have free access to medical records and to furnish information or provide copies of medical records upon request. Records will be maintained a minimum of seven years.

8. Assure that each of the Department's patients have a complete medical evaluation on admission and annually, and a current plan of care which includes physician, nursing and social services for rehabilitation and treatment.

9. Undergo at least an annual, on-site evaluation by a Medical Review Team of the Department to determine whether quality, quantity and level of care requirements are being met by the Nursing Home. Upon written notification by the Department of deficiencies and/or alternative care planning, the Nursing Home will take corrective action within a period not to exceed six months. Failure to correct deficiencies will be a cause for the Department to terminate the agreement, payments, and participation by the Nursing Home in the Department's Programs.

10. File a Utilization Review Plan for approval by the Department and establish an internal Utilization Review Program and Committee of services and facilities of the Nursing Home and a sample of patient records or cases currently receiving care and cases discharged. Physicians having an ownership interest in the Nursing Home may not serve on the Nursing Home's Utilization Review Committee. The Nursing Home will file with the Department a quarterly statistical report of all cases with a sub-total of Medical Assistance Cases reviewed and disposed of by the Nursing Home Utilization Review Committee.

11. Furnish to the Department full and complete information as to the identity: (a) of each person having, directly or indirectly, an ownership interest of 10 percent or more in the Nursing Home; (b) in case the Nursing Home is organized as a corporation; ownership interest of each officer and director of the corporation; and (c) in case the Nursing Home is organized as a partnership, ownership interest in each partner. Changes in ownership will

be promptly reported to the Department and a new agreement must be executed between the Nursing Home and the Department.

12. Plan in cooperation with the County Assistance Offices of the Department to assure the timely transfer to lesser levels of care within 60 days or the timely discharge of Department's patients no longer requiring Nursing Home Care.

13. The Nursing Home will charge the Department or its recipients according to the Department's Regulations for Public or Private Skilled Nursing Care.

14. For payments on behalf of Medical Assistance patients in Public Nursing Homes, submit invoices monthly to the County Assistance Office, on forms provided by the Department and certify that information contained in original or copies of records and invoices submitted is true, accurate, and complete.

15. Recognize that payment and satisfaction of claims will be from Federal and State funds, and that any false claim, statement of documents or concealment of material fact may be cause for prosecution under applicable Federal or State laws.

16. File quarterly statements with the Department on the average daily census and number and types of personnel on each shift during a week of a quarterly period.

17. Public Nursing Homes will file required fiscal reports with the State Auditor General within 90 days after the end of each calendar year or within 90 days after receipt of the forms and instructions, whichever is later. Failure to file a report before March 31, unless an extension of time is granted by the Auditor General, will result in termination of payments and participation upon written notice of the Department.

18. The Nursing Home agrees to abide by the Department's Regulations and all other applicable State and Federal laws and regulations in existence at the effective date of the agreement and as they may be changed from time to time after proper notice of contemplated changes are issued in accordance with existing policies and procedures. Failure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith. Any new or revised State and Federal Regulations and Laws adopted, which affect this Agreement or the Nursing Home's performance hereunder, constitute an option on the part of the Nursing Home to terminate this Agreement within 30 days if such changes are not acceptable to the Nursing Home.

B. *Department's Responsibilities*

The Department will carry out the following responsibilities:

1. Inspect, certify, and approve Nursing Facilities for participation in the Department's Programs under Title XIX of the Social Security Act.

2. Notify Nursing Facilities in writing of any deficiencies in operation or level of patient care.

3. Determine eligibility of Medical Assistance patients for Nursing Home Care through the Department's County Assistance Offices and notify the Nursing Home.

4. Make payments and any payment adjustments to the Nursing Home according to the Department's Regulations.

5. Assist the home to place or transfer patients to other facilities if the Agreement is cancelled by either party.

C. *General Provisions*

1. This Agreement may be terminated by either party upon 30 days advance written notice. (Either party has the right of appeal within 30 days after receipt of a written notice terminating the agreement).

2. In the event the Agreement is terminated, the obligations of the Department to make payments to the Nursing Home for prior services shall be in accordance with the Department's Regulations governing payments for Nursing Home Care.

3. This Agreement, when approved by the Department, is effective on _____ and will extend until _____. The Agreement will then be considered for renewal in writing for one additional six months period or subsequent one year periods providing the standards and requirements are being met.

In WITNESS WHEREOF, the parties have caused this Agreement to be executed by their officials thereunto duly authorized.

NURSING HOME	DEPARTMENT OF PUBLIC WELFARE
_____	_____
Name	Name
_____	_____
Title	Title
_____	_____
Date	Date